

Commentary: Lawyer Advertising - A Simpler Way

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We offer our contribution to the stream of comments which have undoubtedly been directed to the Presiding Justices of the Appellate Divisions on the proposed new rules governing lawyer advertising and solicitation. Generally, we suggest the much more simple approach of the American Bar Association (ABA), especially at this time when COSAC has proposed adoption of the format and much of the content of the ABA Model Rules.

A system for controlling lawyer advertising should be as clear and precise as possible. It should concentrate on the lawyer's commitment to truth and integrity. What more emphatic statement of this commitment can there be than Model Rule 7.1?

Communications Concerning A Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

The Rule revolves around the word "communication", a simple umbrella covering anything written or spoken. Use of this word makes superfluous the three new definitions proposed by the Judges for the terms "Advertisement", "Solicitation", and "Computer accessed communication". (Proposed changes to 22 NYCRR Section 1200.1 (Definitions)).

Superfluous also are the items listed under proposed DR 2-101(C) which lawyers are permitted to include in their advertising. Most of these are things the client would like to know about any lawyer before retaining him. Why bother to give them the blessing of judicial inclusion when they fall more logically into the category of routine information?

As for the restrictions listed in subparagraphs (1) through (8) of proposed DR 2-101(D), we suggest the following:

1. Strict adherence to the principles of truth in advertising would make most of these restrictions redundant.
2. Some of the restrictions - use of a courtroom, reproduction of legal documents, endorsement by a current or former client - serve no identifiable purpose.
3. The disclaimer that prior results do not guarantee or predict a similar outcome in a future matter is an obvious and unnecessary restriction which no reasonable client needs.
4. Those few restrictions which do survive analysis can easily be incorporated in the definition of communications in MR 7.1.

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A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading. The following communications shall be deemed materially misleading: a paid endorsement or testimonial; the voice or image of a person other than the attorney or a member of the law firm issuing the communication; portrayal of a judge, or of a lawyer by a non-lawyer, or a fictitious name for lawyers not associated in a law firm; a nickname, motto, moniker or trade name that implies the ability to obtain results in a matter. (The new matter in MR 7.1 is displayed in italics.)

The definition can be further expanded by inserting the following, instead of the prohibitions in proposed DR 2-101(F).

Also deemed materially misleading and therefore prohibited are statements in a communication that compare the lawyer's services with the services of other lawyers or that contain a designation, title or description suggesting or implying that the lawyer's services are superior to or better than the services of other lawyers.

This last suggestion presupposes that the Judges will want to strike down the designations "Best Lawyer" and "Super Lawyer", both of which are the subject of litigation before the New Jersey Supreme Court. It seems to us that these designations - if desirable or even useful - cannot be sustained in a system which requires adherence to the truth, unless the process of selection and designation is controlled by the organized bar.

With respect to those proposals of the Judges regarding labeling, filing and record keeping - we think these are unnecessarily burdensome.

So long as the public is aware that the communication is in fact an advertisement, and the facts in the communication are true and not misleading, why require anything more than the word "Advertisement" on the screen - either on TV or on a computer - or on the first page of any written communication? Any why designate it "Attorney Advertising" or "an advertisement for legal services"?

Why not simply "Advertisement"? No other advertiser is required to remind the reader or the viewer that what he's seeing or hearing is an advertisement. The content tells the story.

The Judges' proposals for filing and record keeping are especially onerous. We think it would be enough to require that at least one copy of every communication covered by the rules be retained and made available by the lawyer for two years following its dissemination to the public. If CLE certificates can be controlled in this way, why not a lawyer's ads? We do agree that every ad should contain the lawyer's name, address and phone number in a type size and style that is clearly visible or in tones that are clearly audible.

As we expressed in our article on the proposed rules (NYPRR August 2006), we consider the proposals on domain names (proposed DR 2-102(E)(F)) too vague to be enforceable. We suggested instead the following language, "an Internet domain name shall be used in communications only in association or conjunction with the full name of the lawyer or law firm."

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